

## § 73.38

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other Safeguards Information as defined in § 73.22(a) of this part shall protect that information against unauthorized disclosure as specified in §§ 73.21 and 73.22 of this part.

[78 FR 29550, May 20, 2013, as amended at 79 FR 75741, Dec. 19, 2014]

### **§ 73.38 Personnel access authorization requirements for irradiated reactor fuel in transit.**

(a) *General.* (1) Each licensee who transports, or delivers to a carrier for transport, in a single shipment, a quantity of spent nuclear fuel as described in § 73.37(a)(1) of this part shall comply with the requirements of this section, as appropriate, before any spent nuclear fuel is transported or delivered to a carrier for transport.

(2) Each licensee shall establish, implement, and maintain its access authorization program under the requirements of this section.

(i) Each licensee shall be responsible for the continuing effectiveness of the access authorization program.

(ii) Each licensee shall ensure that the access authorization program is reviewed at an appropriate frequency to confirm compliance with the requirements of this section and that prompt comprehensive actions are taken to correct any noncompliance that is identified.

(iii) The review shall evaluate all program performance objectives and requirements.

(iv) Each review report must document conditions that are adverse to the proper performance of the access authorization program, the cause of the condition(s), and when appropriate, recommended corrective actions, and corrective actions taken. The licensee shall review the audit findings and take any additional corrective actions necessary to preclude repetition of the condition, including reassessment of the deficient areas where indicated.

(3) By August 19, 2013, each licensee that is subject to this provision shall implement the requirements of this section through revisions to its physical security plan or transportation security plan.

(b) *General performance objective.* The licensee's access authorization program must ensure that the individuals

specified in paragraph (c) of this section are trustworthy and reliable such that they do not constitute an unreasonable risk to public health and safety or the common defense and security.

(c) *Applicability.* (1) Licensees shall subject the following individuals to an access authorization program:

(i) Any individual to whom a licensee intends to grant unescorted access to spent nuclear fuel in transit, including employees of a contractor or vendor;

(ii) Any individual whose duties and responsibilities permit the individual to take actions by physical or electronic means that could adversely impact the safety, security, or emergency response to spent nuclear fuel in transit (*i.e.*, movement control personnel, vehicle drivers, or other individuals accompanying spent nuclear fuel shipments);

(iii) Any individual whose duties and responsibilities include implementing a licensee's physical protection program under § 73.37, including but not limited to, non-LLEA armed escorts;

(iv) Any individual whose assigned duties and responsibilities provide access to spent nuclear fuel shipment information that is considered to be Safeguards Information under § 73.22(a)(2); and

(v) The licensee access authorization program reviewing official.

(2) Fingerprinting, and the identification and criminal history records checks required by Section 149 of the Atomic Energy Act of 1954, as amended, and other elements of the background investigation are not required for the following individuals prior to granting access authorization relative to spent nuclear fuel in transit:

(i) Persons identified in §§ 73.59 and 73.61 of this part;

(ii) Federal, State, and local officials, including inspectors, whose occupational status are consistent with the promotion of common defense and security and the protection of public health and safety relative to spent nuclear fuel in transit;

(iii) Emergency response personnel who are responding to an emergency;

(iv) An individual who has had a favorably adjudicated U.S. Government criminal history records check within the last 5 years, under a comparable

U.S. Government program involving fingerprinting and an FBI identification and criminal history records check (e.g. National Agency Check, Transportation Worker Identification Credentials (TWIC) under 49 CFR part 1572, Bureau of Alcohol Tobacco Firearms and Explosives background check and clearances under 27 CFR part 555, Health and Human Services security risk assessments for possession and use of select agents and toxins under 42 CFR part 73, Hazardous Material security threat assessment for hazardous material endorsement to commercial drivers license under 49 CFR part 1572, Customs and Border Patrol's Free and Secure Trade (FAST) Program) provided that he or she makes available the appropriate documentation. Written confirmation from the agency/employer that granted the Federal security clearance or reviewed the criminal history records check must be provided to the licensee. The licensee shall retain this documentation for a period of 3 years from the date the individual no longer requires access authorization relative to spent nuclear fuel in transit; and

(v) Any individual who has an active Federal security clearance, provided that he or she makes available the appropriate documentation. Written confirmation from the agency/employer that granted the Federal security clearance or reviewed the criminal history records check must be provided to the licensee. The licensee shall retain this documentation for a period of 3 years from the date the individual no longer requires access authorization relative to spent nuclear fuel in transit.

(d) *Background investigation.* Before allowing an individual to have unescorted access or access authorization relative to spent nuclear fuel<sup>2</sup> in transit the licensees shall complete a background investigation as defined in § 73.2 of this part of the individual seeking to have unescorted access or access authorization. The scope of the investigation must encompass at least the

past 10 years, or if 10 years of information is not available then as many years in the past that information is available. The background investigation does not apply to Federal, State or local law enforcement personnel who are performing escort duties. The background investigation must include, but is not limited to, the following elements:

(1) *Informed consent.* Licensees shall not initiate any element of a background investigation without the informed and signed consent of the subject individual. This consent shall include authorization to share personal information with appropriate entities. The licensee to whom the individual is applying for access authorization shall inform the individual of his or her right to review information collected to assure its accuracy, and provide the individual with an opportunity to correct any inaccurate or incomplete information that is developed by the licensee.

(i) The subject individual may withdraw his or her consent at any time. Licensees shall inform the individual that:

(A) Withdrawal of his or her consent will remove the individual's application for access authorization under the licensee's access authorization program; and

(B) Other licensees shall have access to information documenting the withdrawal.

(ii) If an individual withdraws his or her consent, licensees may not initiate any elements of the background investigation that were not in progress at the time the individual withdrew his or her consent, but shall complete any background investigation elements that are in progress at the time consent is withdrawn. The licensee shall record the status of the individual's application for access authorization. Additionally, licensees shall collect and maintain the individual's application for access authorization; his or her withdrawal of consent for the background investigation; the reason given by the individual for the withdrawal; and any pertinent information collected from the background investigation elements that were completed. This information must be shared with

<sup>2</sup>For purposes of 10 CFR 73.38, the terms "irradiated reactor fuel" as described in 10 CFR 73.37 and "spent nuclear fuel" are used interchangeably.

other licensees under paragraph (1)(4) of this section.

(iii) Licensees shall inform, in writing, any individual who is applying for access authorization that the following actions are sufficient cause for denial or unfavorable termination of access authorization status:

(A) Refusal to provide a signed consent for the background investigation;

(B) Refusal to provide, or the falsification of, any personal history information required under this section, including the failure to report any previous denial or unfavorable termination of access authorization;

(C) Refusal to provide signed consent for the sharing of personal information with other licensees under paragraph (d)(5)(v) of this section; or

(D) Failure to report any arrests or legal actions specified in paragraph (f) of this section.

(2) *Personal history disclosure.* Any individual who is required to have a background investigation under this section shall disclose the personal history information that is required by the licensee's access authorization program for the reviewing official to make a determination of the individual's trustworthiness and reliability. Refusal to provide, or the falsification of, any personal history information required by this section is sufficient cause for denial or termination of access authorization.

(3) *Criminal history.* Fingerprinting and an FBI identification and criminal history records check under § 73.57 of this part.

(4) *Verification of true identity.* Licensees shall verify the true identity of an individual who is applying to have access authorization to ensure that the applicant is who they claim to be. A licensee shall review official identification documents (e.g., driver's license, passport, government identification, State, province, or country of birth issued certificate of birth) and compare the documents to personal information data provided by the individual to identify any discrepancy in the information. Licensees shall document the type, expiration, and identification number of the identification, or maintain a photocopy of identifying documents on file under § 73.38(c). Licensees

shall certify and affirm in writing that the identification was properly reviewed and maintain the certification and all related documents for review upon inspection.

(5) *Employment history evaluation.* Licensees shall ensure that an employment history evaluation has been completed on a best effort basis, by questioning the individual's present and former employers, and by determining the activities of the individual while unemployed.

(i) For the claimed employment period, the individual must provide the reason for any termination, eligibility for rehire, and other information that could reflect on the individual's trustworthiness and reliability.

(ii) If the claimed employment was military service the individual shall provide a characterization of service, reason for separation, and any disciplinary actions that could affect a trustworthiness and reliability determination.

(iii) If education is claimed in lieu of employment, the individual shall provide any information related to the claimed education that could reflect on the individual's trustworthiness and reliability and, at a minimum, verify that the individual was registered for the classes and received grades that indicate that the individual participated in the educational process during the claimed period.

(iv) If a previous employer, educational institution, or any other entity with which the individual claims to have been engaged fails to provide information or indicates an inability or unwillingness to provide information within 3 business days of the request, the licensee shall:

(A) Document this refusal or unwillingness in the licensee's record of the investigation; and

(B) Obtain a confirmation of employment, educational enrollment and attendance, or other form of engagement claimed by the individual from at least one alternate source that has not been previously used.

(v) When any licensee is seeking the information required for an access authorization decision under this section and has obtained a signed release from the subject individual authorizing the

disclosure of such information, other licensees shall make available the personal or access authorization information requested regarding the denial or unfavorable termination of an access authorization.

(vi) In conducting an employment history evaluation, the licensee may obtain information and documents by electronic means, including, but not limited to, telephone, facsimile, or email. Licensees shall make a record of the contents of the telephone call and shall retain that record, and any documents or electronic files obtained electronically, under paragraph (1) of this section.

(6) *Credit history evaluation.* Licensees shall ensure the evaluation of the full credit history of any individual who is applying for access authorization relative to spent nuclear fuel in transit. A full credit history evaluation must include, but is not limited to, an inquiry to detect potential fraud or misuse of social security numbers or other financial identifiers, and a review and evaluation of all of the information that is provided by a national credit-reporting agency about the individual's credit history. For foreign nationals and U.S. citizens who have resided outside the U.S. and do not have established credit history that covers at least the most recent 7 years in the U.S., the licensee must document all attempts to obtain information regarding the individual's credit history and financial responsibility from some relevant entity located in that other country or countries.

(7) *Criminal history review.* The licensee shall evaluate the entire criminal history record of an individual who is applying for access authorization to determine whether the individual has a record of criminal activity that may adversely impact his or her trustworthiness and reliability. The scope of the applicant's criminal history review must cover all residences of record for the 10-year period preceding the date of application for access authorization.

(8) *Character and reputation determination.* Licensees shall ascertain the character and reputation of an individual who has applied for access authorization relative to spent nuclear fuel in transit by conducting reference checks.

Reference checks may not be conducted with any person who is known to be a close member of the individual's family, including but not limited to, the individual's spouse, parents, siblings, or children, or any individual who resides in the individual's permanent household. The reference checks must focus on the individual's reputation for trustworthiness and reliability.

(9) *Corroboration.* The licensee shall also, to the extent possible, obtain independent information to corroborate that provided by the individual (e.g., seek references not supplied by the individual).

(e) *Determination of trustworthiness and reliability; Documentation.* (1) The licensee shall determine whether to grant, deny, unfavorably terminate, maintain, or administratively withdraw an individual's access authorization based on an evaluation of all of the information required by this section. The licensee may terminate or administratively withdraw an individual's access authorization based on information obtained after the background investigation has been completed and the individual granted access authorization.

(2) The licensee may not permit any individual to have unescorted access or access authorization until all of the information required by this section has been evaluated by the reviewing official and the reviewing official has determined that the individual is trustworthy and reliable. The licensee may deny unescorted access or access authorization to any individual based on disqualifying information obtained at any time during the background investigation.

(f) *Protection of information.* (1) Licensees shall protect background investigation information from unauthorized disclosure.

(2) Licensees may not disclose the background investigation information collected and maintained to persons other than the subject individual, his/her representative, or to those who have a need to know in performing assigned duties related to the process of granting or denying unescorted access to spent nuclear fuel in transit. No individual authorized to have access to

the information may re-disseminate the information to any other individual who does not have a need to know.

(3) The personal information obtained on an individual from a background investigation may be transferred to another licensee:

(i) Upon the individual's written request to the licensee holding the data to re-disseminate the information contained in his/her file; and

(ii) The acquiring licensee verifies information such as name, date of birth, social security number, sex, and other applicable physical characteristics for identification.

(4) The licensee shall make background investigation records obtained under this section available for examination by an authorized representative of the NRC to determine compliance with applicable laws and regulations.

(5) The licensee shall retain all fingerprint and criminal history records received from the FBI, or a copy if the file has been transferred, on an individual (including data indicating no record) for 5 years from the date the individual no longer requires unescorted access or access authorization relative to spent nuclear fuel in transit.

(g) *Grandfathering.* For purposes of this section, licensees are not required to obtain the fingerprints of any person who has been fingerprinted, pursuant to an NRC order or regulation, for an FBI identification and criminal history records check within the 5 years of the effective date of this rule.

(h) *Reinvestigations.* Licensees shall conduct fingerprinting and FBI identification and criminal history records check, a criminal history review, and credit history re-evaluation every 10 years for any individual who has unescorted access authorization to spent nuclear fuel in transit. The re-investigations must be completed within 10 years of the date on which these elements were last completed and should address the 10 years following the previous investigation.

(i) *Self-reporting of legal actions.* (1) Any individual who has applied for an access authorization or is maintaining an access authorization under this section shall promptly report to the re-

viewing official, his or her supervisor, or other management personnel designated in licensee procedures any legal action(s) taken by a law enforcement authority or court of law to which the individual has been subject that could result in incarceration or a court order or that requires a court appearance, including but not limited to an arrest, an indictment, the filing of charges, or a conviction, but excluding minor civil actions or misdemeanors such as parking violations or speeding tickets. The recipient of the report shall, if other than the reviewing official, promptly convey the report to the reviewing official. On the day that the report is received, the reviewing official shall evaluate the circumstances related to the reported legal action(s) and re-determine the reported individual's access authorization status.

(2) The licensee shall inform the individual of this obligation, in writing, prior to granting unescorted access or certifying access authorization.

(j) *Access authorization procedures.* (1) Licensees shall develop, implement, and maintain written procedures for conducting background investigations for persons who are applying for unescorted access or access authorization for spent nuclear fuel in transit.

(2) Licensees shall develop, implement, and maintain written procedures for updating background investigations for persons who are applying for reinstatement of unescorted access or access authorization.

(3) Licensees shall develop, implement, and maintain written procedures to ensure that persons who have been denied unescorted access or access authorization are not allowed access to spent nuclear fuel in transit or information relative to spent nuclear fuel in transit.

(4) Licensees shall develop, implement, and maintain written procedures for the notification of individuals who are denied unescorted access or access authorization for spent nuclear fuel in transit. The procedures shall include provisions for the review, at the request of the affected individual, of a denial or termination of unescorted access or access authorization. The procedure must contain a provision to ensure that the individual is informed of

the grounds for the denial or termination of unescorted access or access authorization and allow the individual an opportunity to provide additional relevant information.

(k) *Right to correct and complete information.* (1) Prior to any final adverse determination, licensees shall provide each individual subject to this section with the right to complete, correct, and explain information obtained as a result of the licensee's background investigation. Confirmation of receipt by the individual of this notification must be maintained by the licensee for a period of 1 year from the date of the notification.

(2) If after reviewing their criminal history record an individual believes that it is incorrect or incomplete in any respect and wishes to change, correct, update, or explain anything in the record, the individual may initiate challenge procedures.

(1) *Records.* (1) The licensee shall retain documentation regarding the trustworthiness and reliability of individual employees for 5 years from the date the individual no longer requires unescorted access or access authorization relative to spent nuclear fuel in transit.

(2) The licensee shall retain a copy of the current access authorization program procedures as a record for 5 years after the procedure is no longer needed or until the Commission terminates the license, if the license is terminated before the end of the retention period. If any portion of the procedure is superseded, the licensee shall retain the superseded material for 5 years after the record is superseded.

(3) The licensee shall retain the list of persons approved for unescorted access or access authorization and the list of those individuals that have been denied unescorted access or access authorization for 5 years after the list is superseded or replaced.

(4) Licensees who have been authorized to add or manipulate data that is shared with licensees subject to this section shall ensure that data linked to the information about individuals who have applied for unescorted access or access authorization, which is specified in the licensee's access authorization program documents, is retained.

(i) If the shared information used for determining individual's trustworthiness and reliability changes or new or additional information is developed about the individual, the licensees that acquire this information shall correct or augment the data and ensure it is shared with licensees subject to this section. If the changed, additional or developed information has implications for adversely affecting an individual's trustworthiness and reliability, licensees who discovered or obtained the new, additional or changed information, shall, on the day of discovery, inform the reviewing official of any licensee access authorization program under which the individual is maintaining his or her unescorted access or access authorization status of the updated information.

(ii) The reviewing official shall evaluate the shared information and take appropriate actions, which may include denial or unfavorable termination of the individual's unescorted access or access authorization. If the notification of change or updated information cannot be made through usual methods, licensees shall take manual actions to ensure that the information is shared as soon as reasonably possible. Records maintained in any database(s) must be available for the NRC review.

(5) If a licensee administratively withdraws an individual's unescorted access or access authorization status caused by a delay in completing any portion of the background investigation or for a licensee initiated evaluation, or re-evaluation that is not under the individual's control, the licensee shall record this administrative action to withdraw the individual's unescorted access or unescorted access authorization and shall share this information with other licensees subject to this section. However, licensees shall not document this administrative withdrawal as denial or unfavorable termination and shall not respond to a suitable inquiry conducted under the provisions of 10 CFR part 26, a background investigation conducted under the provisions of this section, or any other inquiry or investigation as denial nor unfavorable termination. Upon favorable completion of the background investigation element that caused the

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administrative withdrawal, the licensee shall immediately ensure that any matter that could link the individual to the administrative action is eliminated from the subject individual's access authorization or personnel record and other records, except if a review of the information obtained or developed causes the reviewing official to unfavorably terminate or deny the individual's unescorted access.

[78 FR 29553, May 20, 2013]

### PHYSICAL PROTECTION REQUIREMENTS AT FIXED SITES

#### **§ 73.40 Physical protection: General requirements at fixed sites.**

Each licensee shall provide physical protection at a fixed site, or contiguous sites where licensed activities are conducted, against radiological sabotage, or against theft of special nuclear material, or against both, in accordance with the applicable sections of this Part for each specific class of facility or material license. If applicable, the licensee shall establish and maintain physical security in accordance with security plans approved by the Nuclear Regulatory Commission.

[58 FR 13700, Mar. 15, 1993]

#### **§ 73.45 Performance capabilities for fixed site physical protection systems.**

(a) To meet the general performance requirements of § 73.20 a fixed site physical protection system shall include the performance capabilities described in paragraphs (b) through (g) of this section unless otherwise authorized by the Commission.

(b) Prevent unauthorized access of persons, vehicles and materials into material access areas and vital areas. To achieve this capability the physical protection system shall:

(1) Detect attempts to gain unauthorized access or introduce unauthorized material across material access or vital area boundaries by stealth or force using the following subsystems and subfunctions:

(i) Barriers to channel persons and material to material access and vital area entry control points and to delay any unauthorized penetration attempts by persons or materials sufficient to

assist detection and permit a response that will prevent the penetration; and

(ii) Access detection subsystems and procedures to detect, assess and communicate any unauthorized penetration attempts by persons or materials at the time of the attempt so that the response can prevent the unauthorized access or penetration.

(2) Detect attempts to gain unauthorized access or introduce unauthorized materials into material access areas or vital areas by deceit using the following subsystems and subfunctions:

(i) Access authorization controls and procedures to provide current authorization schedules and entry criteria for both persons and materials; and

(ii) Entry controls and procedures to verify the identity of persons and materials and assess such identity against current authorization schedules and entry criteria before permitting entry and to initiate response measures to deny unauthorized entries.

(c) Permit only authorized activities and conditions within protected areas, material access areas, and vital areas. To achieve this capability the physical protection system shall:

(1) Detect unauthorized activities or conditions within protected areas, material access areas and vital areas using the following subsystems and subfunctions:

(i) Controls and procedures that establish current schedules of authorized activities and conditions in defined areas;

(ii) Boundaries to define areas within which the authorized activities and conditions are permitted; and

(iii) Detection and surveillance subsystems and procedures to discover and assess unauthorized activities and conditions and communicate them so that response can be such as to stop the activity or correct the conditions to satisfy the general performance objective and requirements of § 73.20(a).

(d) Permit only authorized placement and movement of strategic special nuclear material within material access areas. To achieve this capability the physical protection system shall: